No. 506

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,

Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company, a New Jersey corporation.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

(This petition and brief are substantially the same as those in the *Manhattan Properties* case, except that the discussion of the $4,404.40 item at pages 3 and 25 herein only is additional.)

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New York, October, 1933.

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against
IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company, a New Jersey corporation.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully submit their petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case.

Summary Statement of Matter Involved.

In 1920 petitioners leased premises at 1402 Farnam Street, Omaha, to the bankrupt corporation, United Cigar Stores Company, for a term ending June 30, 1945. The lease contained a covenant authorizing the landlord to terminate the lease and re-enter upon the adjudication of the tenant as

bankrupt, *inter alia,* and providing that upon such termination the tenant would indemnify the landlord for loss suffered.

The bankrupt was adjudicated, upon its voluntary petition, in the United States District Court for the Southern District of New York, August 29, 1932; on November 26, 1932, petitioners terminated the lease and re-entered (R. 26-28).

Petitioners claim, for $143,615.80, is based upon two items: (1) loss actually suffered between September 1 and November 26, 1932, and (2) difference between rent reserved and rental value for the residue of the term (R. 28-29).

The claim was expunged by Referee Kurtz, whose order was affirmed by the District Court (Coleman, J.) and by the Circuit Court of Appeals (opinion by L. Hand, J.) upon the basis of its decision in *Manhattan Properties, Inc.* v. *Irving Trust Co.,* simultaneously announced.

The Court below, although deciding adversely to petitioners, was not unsympathetic to their claim.

Although Judge Learned Hand did not in terms dissent, he expressed the conclusions of the individual judges as follows in the opinion in the *Manhattan Properties* case:

> "For these reasons my brothers believe that it [its own previous decision in *In re Roth & Appel,* 181 Fed. 667, that landlords' damage claims were unprovable] has become the settled law of this Circuit and that we should adhere to it. For myself, while I recognize the force of this application of stare decisis, it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think that we should make the necessary adjustments. Certainly I have no more compunction in assessing the future value of realty, than that of chattels. The periods involved are indeed apt to be longer but the fluctuations are less rapid. Some chances must be taken, but that is often so."

Judge Hand's reference to the "authoritative declaration" of the provability of "contingent claims" is shown by the rest of his opinion to be an allusion to the decision of this Court in *Maynard* v. *Elliott*, 283 U. S. 273, that liability need not have accrued at the time of the filing of the petition.

As to the item in petitioners' claim respecting loss suffered prior to November 26, 1932, the $4,404.40 item, Judge Hand said (R. 55-56):

> "Finally, the question arises as to so much of the claim as accrued before the expiration of the time to file claims, which could of course have been pro tanto liquidated in season, like a claim against an indorser of a note which became due before that time. This part of the claim seems to me to present acutely the issue in general, and of course as I should include damages for all installments, a fortiori I should include these. But taken strictly, the doctrine of In re Roth & Appel, 181 Fed. Rep. 667, does not admit of that variant. A claim for future rent must be fixed at petition filed and not become absolute thereafter; the distinction attaches not only to realty itself, but to covenants which concern it or rents issuing from it. We all agree that the claim was either good or bad as a whole, though we recognize that there are stronger reasons for holding good that part which fell due before the expiry of the period to file claims, or to distribute the estate."

Question Presented.

Is a landlord's claim for damages suffered by reason of a bankrupt tenant's default upon a lease which contains an indemnity clause, provable in bankruptcy?

Reasons Relied on for Allowance of the Writ.

1. The present economic depression has made this question one of acute importance which should be passed on by this Court.

The use of the Bankruptcy Act by chain store organizations* to throw almost the entire economic loss suffered by their creditors upon the landlord group has resulted in wholesale defaults on leases throughout the country. There are in addition very many bankruptcies, like that in the *Manhattan Properties* case, in which landlords have lost the benefit of advantageous contracts, but which have not attracted the public attention which the chain store bankruptcies have received. The issue of certiorari to review a decision of the Second Circuit is especially appropriate, because the chain store cases involving leases throughout the nation are under administration in that Circuit. This is especially hard upon chain store landlords in circuits which regard landlords' damage claims as provable.

Indicative of the general interest are the numerous articles on this subject which have recently appeared in legal periodicals.†

2. There is perhaps no question of law upon which there has been greater diversity of view among the lower federal courts than that of the provability of landlords' claims in bankruptcy.

The opinion of Judge Learned Hand (*Manhattan Properties* case) expressly notes that the Circuit Courts of Appeals of the Third Circuit (*In re Keith-Gara Co.*, 203 Fed. 585) and of the Seventh Circuit (*In re Chakos*, 24 Fed. [2d] 482)

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* *In re McCrory Stores Corporation, In re United Cigar Stores Company, In re F. & W. Grand 5-10-25 Cent Stores, Inc.*, and *In re Louis K. Liggett Drug Company* are the best known of the chain store bankruptcy proceedings now pending in the Southern Judicial District of New York.

† *Rent Claims in Bankruptcy*, Schwabacher and Weinstein, 33 COL. L. REV. 213; *Landlords' Claims in Reorganizations*, Douglas and Frank, 42 YALE L. J. 1003; *Landlords' Claim for Damages for Breach of Lease*, Aidlin, 20 CALIF. L. REV. 622; *Effect on Lease of Bankruptcy of Tenant*, Lewis, 65 U. S. L. REV. 611; also CIN. L. REV. 162; 15 MINN. L. REV. 584; 25 ILL. L. REV. 323; 16 VA. L. REV. 610.

have held landlords' claims for damages provable. Judge Hand concludes that in the First, Fifth, Eighth and Ninth Circuits the rule is otherwise. He also mentions the Sixth, but it is believed that the actual decisions in the Sixth Circuit are not hostile to claims on leases containing indemnity covenants. A detailed analysis of the law in the various circuits is annexed to brief filed herewith as an appendix.

This diversity of view has several times been the subject of remark by judges of the lower courts. As long ago as 1911, Judge Hough, sitting in the District Court for the Southern District of New York, said in *In re Roth & Appel*, 174 Fed. 64, at p. 68:

> "The hopeless confusion produced by conflicting decisions on the subject under review requires an authoritative ruling, which this court cannot give. The matter should be promptly taken to the Circuit Court of Appeals, and settled, at least so far as this circuit is concerned."

This sentiment was echoed the following year by Judge McPherson of the Eastern District of Pennsylvania in *In re Caloris Mfg. Co.*, 179 Fed. 722, at p. 723:

> "I cordially agree with Judge Hough that the conflicting decisions on this subject are in a state of 'hopeless confusion' and that *an authoritative decision is much to be desired. Certainly, neither he nor I can give it, and it will probably need the intervention of the Supreme Court before the inferior tribunals will know what rule to obey.*"

Judge McPherson's decision was diametrically opposed to that of Judge Hough.

And as recently as 1932, Judge Knight, sitting in the Western District of New York, said in *In re Hubbard*, 57 Fed. (2d) 213:

> "As was said by Judge Hough in *In re Roth & Appel*, 174 F. 64, 68, there is 'hopeless confusion' in

> the decisions upon the question of whether claims arising out of leases entered into before and continuing by their terms after adjudication are provable in bankruptcy."

The reason these judges used the expression "hopeless confusion" is perhaps that, although there may be only two rules, there has been an extraordinary variety of reasoning. Even the courts that agree as to result do not agree as to why that result should be reached.

3. The rationale of most of the decisions hostile to landlords' claims has been eliminated by subsequent decisions of this Court.

Because the trustee has the right of affirming leases, some courts have said that the liability of the bankrupt tenant does not accrue until after the filing of the petition. That the trustee's right of affirmation of a forward commercial contract prevents the injured party from proving a claim for the loss of the value of the contract, after disaffirmance, is denied by *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581; and in *Maynard* v. *Elliott,* 283 U. S. 273, this Court held that it was not necessary that the liability have accrued at the time of the filing of the petition.

The leading cases in the circuits holding against provability antedate these decisions of this Court, and, indeed, the majority of the Circuit Court of Appeals in this case felt prevented by the doctrine of *stare decisis* from re-examining its own earlier decisions.

4. It seems manifestly unfair that all other persons damaged by the bankrupt's default on forward contracts should be allowed to prove damages, but that landlords should be excluded. Damages have been held provable with respect to at least the following forward agreements anticipatorily breached by bankruptcy:

> An agreement to pay in instalments over a term of years for a baggage and livery privilege (*Central Trust Co.* v. *Chicago Auditorium Assn.,* 240 U. S. 581);

A life annuity (*Cobb* v. *Overman*, 109 Fed. 65 [C. C. A. 4th]);

Endorsement of commercial paper (*Maynard* v. *Elliott*, 283 U. S. 273);

A contract of suretyship (*Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549);

An instalment contract to buy ice (*In re Stern*, 116 Fed. 604 [C. C. A. 2d]);

Employment contracts (*Ex parte Pollard*, Fed. Cas. No. 11,252 [D. Mass.]; *In re Schultz & Guthrie*, 235 Fed. 907 [D. Mass.]);

A lease of personal property (*In re Desnoyers Shoe Co.*, 227 Fed. 401 [C. C. A. 7th]);

A contract to buy cotton bagging (*Lesser* v. *Gray*, 236 U. S. 70;

An instalment contract to sell rubber (*In re Portage Rubber Co.*, 296 Fed. 289 [C. C. A. 6th];

A contract to buy stock (*In re Pettingill*, 137 Fed. 143 [D. Mass.]).

5. The most recent expressions by this Court favor provability of landlords' damage claims.

In *Kothe* v. *R. C. Taylor Trust*, 280 U. S. 224, this Court held a landlord's claim for damages for loss of rent unprovable upon the sole ground that the amount stipulated as damages in the lease bore so little relation to actual loss as to be penal. The Court said in part (p. 226):

> "The amount thus stipulated is so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed that we must hold the provision is for an unenforceable penalty."

This language suggests that actual damages would be thought provable.

In *Maynard* v. *Elliott*, 283 U. S. 273, this Court stated that the doctrine of *In re Roth & Appel*, 181 Fed. 667, that

the limitation of subdivision (1) of Section 63-a of the Act should be read into subdivision (4) had been "rejected." *In re Roth & Appel* has always been regarded as the leading case against landlord's claims and is the case here followed by the Court below. The opinion in *Maynard* v. *Elliott* cited with approval the cases of *In re Caloris Mfg. Co.*, 179 Fed. 722 (E. D. Penna.); *In re Buzzini*, 183 Fed. 827 (S. D. N. Y.), and *In re Keith-Gara Co.*, 203 Fed. 585 (E. D. Penna.), all of which cases expressly refused to follow *In re Roth & Appel.* The same opinion cited with approval *Moch* v. *Market Street National Bank*, 107 Fed. 897 (C. C. A. 3d), referred to in the *Caloris* case as inconsistent with *In re Roth & Appel.* In both the *Caloris* and *Keith-Gara* cases landlords' damage claims were held provable.

6. The *Manhattan Properties* and *Brown* cases present two popular and usual forms of indemnity covenants. The one is a month-to-month clause, the other a simple loss clause. By exercising jurisdiction in these cases the Court will presumably be able to dispose of the whole subject.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the decree of the Circuit Court of Appeals of the Second Circuit in the above case, and that said decree be reversed.

C. DICKERMAN WILLIAMS,
MORRIS J. BRICKER,
Counsel for Petitioners.

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Petitioners,

against

IRVING TRUST COMPANY, as Trustee in Bankruptcy of United Cigar Stores Company, a New Jersey corporation.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Referee (R. 32-40) is not reported in the Federal Reporter or Supplement.

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals (R. 54-56) has not yet been reported.

Jurisdiction.

The decree of the Circuit Court of Appeals, sought to be reviewed, was entered on July 24, 1933 (R. 56).

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Facts.

The facts have been stated in the petition.

Specification of Errors.

It is submitted that the Court below erred:

1. In affirming the decree of the District Court.

2. In holding that the proof of claim did not set forth a provable debt and should be expunged.

3. In adhering to the rule of *In re Roth & Appel,* 181 Fed. 667, despite the decision in *Maynard* v. *Elliott,* 283 U. S. 273.

Summary of Argument.

The claim here at issue comes precisely within Section 63-a (4) of the Act, and should be liquidated under Section 63-b.

The fact that the contingency which brought the indemnity clause into play occurred after the filing of the petition is not important (*Maynard* v. *Elliott,* 283 U. S. 273), if, indeed, the filing of the petition itself did not terminate the lease (*Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581).

The tenant was still liable after the termination of the lease and re-entry, by virtue of the indemnity clause (*Chicago Auditorium* case; *Gardiner* v. *Butler & Co.,* 245 U. S. 603).

The damages are not too speculative. They are, as in anticipatory breach of contract cases, the value of the contract, which is measured by the difference between what was payable under it and is obtainable under the best similar forward contract that can then be made (cf. *Roehm* v. *Horst,* 178 U. S. 1), a sum which has been crystallized through constant application in many anticipatory breach of lease cases into the formula, difference between rent reserved and rental value for the remainder of the term (*Wm. Filene Sons Co.* v. *Weed,* 245 U. S. 597).

This is the method of calculating, in bankruptcy and otherwise, damages resulting from anticipatory breach of forward contracts such as those relating to employment, annuities, commodity purchases, indemnities (citing cases), and should be followed here.

POINT I.

The claim comes precisely within Section 63-a (4) of the Act and should be liquidated under Section 63-b.

Section 63 of the Act provides as follows:

> "(a) Debts of the bankruptcy may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied;
>
> (b) Unliquidated claims against the bankrupt may, pursuant to application to the Court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against the estate."

This section was construed by this Court in *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 556, as follows:

> "Within the intendment of the law provable debts include *all liabilities* of the bankrupt *founded on contract*, express or implied, which at the time of the bankruptcy were fixed in amount *or susceptible of liquidation.*"

POINT II.

The fact that re-entry took place after the filing of the petition is irrelevant. No reason appears for not applying the usual rule that bankruptcy was an anticipatory breach of the contract, including the indemnity clause, but, in any event, it is not necessary that debts under Section 63-a (4) be "absolutely owing at the time of the filing of the petition." *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581; *Maynard* v. *Elliott*, 283 U. S. 273; cf. *In re Desnoyers, Shoe Co.*, 227 Fed. 401 (C. C. A. 7th).

In the *Chicago Auditorium* case this Court held that the filing of a petition in bankruptcy constituted the anticipatory breach of a long term contract to pay in instalments for a livery privilege.

The doctrine of anticipatory breach of contract has sometimes been held inapplicable to leases on the ground that the trustee had the privilege of adopting the lease, and that the lease could therefore not be terminated until the trustee disaffirmed the lease.

But obviously this fact cannot distinguish the lease situation from the *Chicago Auditorium* case. The trustee had the same privilege of affirmance with respect to the executory livery privilege agreement there involved and also had that privilege in the numerous executory commercial contracts with respect to which proof of damages has been allowed (discussed *infra*, pp. 21-23).

The *Chicago Auditorium* case has been distinguished on the ground that it applies to personal covenants only. This might be a valid basis of distinction with respect to leases not containing a damage covenant, but such covenants are personal and survive termination of the lease (*Wm. Filene Sons Co.* v. *Weed*, 245 U. S. 597; *Gardiner* v. *Butler & Co.*, 245 U. S. 603). This point is more fully discussed *infra* (pp. 13-15).

But the question as to whether or not the doctrine of the *Chicago Auditorium* case applies in lease cases is no longer important.

The requirement that the liability exist at the time of the filing of the petition against the bankrupt in order that a claim based upon express contract be provable was removed by the decision of this Court in *Maynard* v. *Elliott*, 283 U. S. 273, in which the case of *In re Roth & Appel* and its reasoning were specifically condemned. The Court there held that the limitation of subdivision (1) that claims evidenced by judgments and instruments in writing be "absolutely owing at the time of the filing of the petition" *should not be read into subdivision (4)*. In the *Maynard* case the bankrupt was liable as an endorser on a note that was by its terms not due *until over a year after the adjudication in bankruptcy.* This Court (opinion by Stone, J.) held that the Bankruptcy Act should be construed "to relieve the honest debtor from the weight of oppressive indebtedness," and that giving due weight to such purpose the claim could not be held unprov-

able (pp. 277-278). *The Court expressly referred to the case of In re Roth & Appel* (at p. 277) *and stated that the contention that the limitation of subdivision* (*a*) (*1*) *should be read into subdivision* (*a*) (*4*) *had been "rejected."*

Application of this ruling is especially appropriate in the present case, involving as it does a liability that was in fact fixed as an immediate and direct result of the bankruptcy, a result contemplated by the lease. In *Maynard* v. *Elliott* liability was fixed by the default of the maker, an event entirely independent of the bankruptcy, and not in fact even substantially coincident therewith, but occurring after the period for the filing of claims had expired.

The courts have often indicated an intention to regard liabilities precipitated by the bankruptcy itself as provable. "But we agree with what was said in *Ex parte Pollard*, 2 Low. 411, Fed. Cas. No. 11,252, that it would be an 'unnecessary and false nicety' to hold that because it was the act of filing that wrought the breach, therefore there was no breach at the time of the filing of the petition" (*Chicago Auditorium* case, 240 U. S. 592).

And where bankruptcy authorized the termination of a contract, the termination has been held to relate back to the filing of the petition (*In re Desnoyers Show Co.*, 227 Fed. 401 [C. C. A. 7th]).

POINT III.

The covenant of indemnity was a personal covenant, not a rent covenant, and is therefore not objectionable under the *Chicago Auditorium* case, but is provable within its doctrine.

Petitioners rest their claim not upon a covenant to *pay rent*, but upon a covenant of indemnity, a personal covenant. Such a covenant is for damages and not for rent.

Filene case, 245 U. S. 597, 602 ("It is not for rent at all");

Hermitage Co. v. *Lœvine*, 248 N. Y. 333.

Consequently, it is not objectionable under the *Chicago Auditorium* case as a rent covenant, but is a personal covenant, and may be made the subject of a claim in bankruptcy.

In the *Chicago Auditorium* case this Court said, mentioning certain cases holding claims relating to real estate not provable in bankruptcy (240 U. S. 590):

> "Cases of the latter class are distinguishable because of the 'diversity between duties which touch the realty, and the meere personalty.' Co. Litt. 292, b, Sec. 513."

This remark is sometimes claimed to mean that there is some arbitrary, unexplained and inexplicable feature of contracts relating to real estate that withdraws them from the operation of Sections 63-a (4) and 63-b. Reference to subsequent decisions of the Court and to the quoted section of Co. Litt. answers this argument.

As explained in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, the Court's remark was simply directed to the point that at common law the doctrine of anticipatory breach of contract was not applied in the ordinary lease case—"*in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee*" (245 U. S. 605).

But that the Court did not mean to indicate that a specific promise by the lessee to indemnify actual loss suffered by the lessor was not enforceable to recover the present value of his loss computed according to conventional method is shown by the fact that in the *Gardiner* case itself an equity receivership proceeding, which related to two Massachusetts leases, *such damages were allowed as to the lease containing an indemnity covenant, and not allowed as to the lease not containing such covenant.*

And in the *Filene* case the Court expressly held that an agreement to pay compensatory damages upon termination of a lease due to the tenant's default was a "personal covenant."

The holding in the *Filene* case, that an agreement by the tenant to pay compensatory damages upon termination of the lease was a personal covenant, is in accord with the general rule that agreements in leases other than for rent in the true sense "touch" "meere personalty" as opposed to "realty."

Witton v. *Bye,* Cro. Jac. 486 (K. B.);
Baynton v. *Bobbett,* 2 Vent. 67 (C. B.);
Newton v. *Weeks,* Aleyn 79 (K. B.);
Clarke v. *Peppin,* 2 Vent. 97 (C. B.);
Anonymous Case, Noy. 60 (Q. B.);
Anonymous Case, 12 Mod. 73 (K. B.);
Lambert v. *Norris,* 2 M. & W. 333 (Exch.).

We refrain at this time from extended discussion of Co. Litt. 292, b, Sec. 213. That section does not hold by any means that no covenant in a lease can survive non-enjoyment.

POINT IV.

The Trustee's argument that the loss is too speculative for assessment overlooks familiar methods of ascertaining damages in cases of anticipatory breach of contract and in liquidating claims in bankruptcy. It is not and cannot be required that the loss be actually experienced, but the value of the contract is determined.

The Trustee, in arguing that the loss is incapable of valuation, does not contend that the value of the remainder of the term cannot be definitely ascertained—indeed in its brief in the *Brown* case below it characterized "difference between rental value and rent reserved" as a "definitely measurable sum."

Rather, it asserts that it is impossible at the present time to ascertain what the actual loss will be in 1945, when the term expires.

This argument, petitioners submit, overlooks the whole doctrine of assessing damages for anticipatory breach of contract, and that of liquidating claims in bankruptcy.

The mere fact that suits for anticipatory breach of contract and liquidation in bankruptcy of obligations due *in futuro* are permitted shows it is not regarded as essential to the establishment of damage in either instance that the loss actually have been experienced.

It is in liquidating claims in bankruptcy and in ascertaining damages for anticipatory breach of contract that the courts principally have occasion to determine the present value of future obligations. On the subject of ascertaining present values, bankruptcy and anticipatory breach of contract cases are cited interchangeably, as, for instance, in *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 250 Fed. 327, at p. 339 (C. C. A. 2d). The decision of this Court in *Central Trust Co.* v. *Chicago Auditorium Association*, 240 U. S. 581, that bankruptcy was an anticipatory breach of contract further assimilated the two situations in so far as the calculation of damages is concerned.

It is axiomatic in both cases that it is unnecessary that the loss actually be experienced.

That the injured person need not wait until the expiration of the time for the execution of an advantageous executory contract was the decision of the English courts in the famous case of *Hochster* v. *De la Tour*, 2 El. & Bl. 678.

In *Roehm* v. *Horst*, 178 U. S. 1, this Court approved and followed the case of *Hochster* v. *De la Tour*. Its opinion expressly recognized that plaintiff's loss had not been actually experienced at the time of the trial. The case concerned the repudiation by the buyer of his duty under forward instalment contracts for the sale of hops. As to the calculation of damages, the Court said (178 U. S. 20-21):

> "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason

> of circumstances of which he ought reasonably to have availed himself. * * * If the vendor has to buy instead of to manufacture, the same principle prevails, and *he may show what was the value of the contract by showing for what price he could have made subcontracts,* just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.
>
> *In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed."*

The Court thus observed that the recovery would be "on a basis of cost which might have been increased or diminished by subsequent events," and that plaintiff "may gain, or lose, by the estimation of his damage in advance."

This method of calculation readily lends itself to the assessment of damages for anticipatory breach of lease, and therefore to the valuation of an indemnity contract.

"Contract price" is "rent reserved"; "market price" is the rental value for the remainder of the term.

In *Wm. Filene Sons Co.* v. *Weed,* 245 U. S. 597, this Court referred to "difference between rental value and rent reserved" as a "footing familiar and fair" for liquidating the damages suffered by the landlord by an anticipatory breach of lease.

The *Filene* case, an equity receivership proceeding, concerned a lease of various parcels of adjoining property in Boston. The lease, like present claimant's, "provided for a re-entry in case of a failure to perform any covenant, of bankruptcy, etc., or of a receiver being appointed and not discharged within ninety days"; it further provided that upon termination the lessee would pay damages in the amount of the difference *between the rental value and the rent for the residue of the term* (245 U. S. 597). There were other incidental provisions not material here. A re-

ceiver was appointed and the landlord re-entered. The landlord filed a claim for such damages. The Court held the claim good, saying in part (Holmes, J., at p. 602):

> "The rest of the claim is for damages ultra the twenty thousand dollars a year—*the difference between the rental value at the date of entry and the rent reserved,* less the amount received under the twenty thousand dollar clause. This also was contracted for and we see no reason why it should not be paid. *The Contract was not that all the rent for the term should become presently due; it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair.*" (Citing cases.)

Among the cases cited by this Court in the *Filene* case are several holding (1) that the landlord suffers present damages because of his loss of an advantageous contract, and (2) that such loss should be allowed in liquidation proceedings at the difference between the rental value and rent reserved for the residue of the term. It is significant that the Court cited both cases from jurisdictions in which the doctrine of anticipatory breach of contract is applied to rent agreements (England [now], Minnesota and Michigan), and from one in which damages on indemnity covenants are allowed (Pennsylvania).

The English case cited was *Ex parte Llynvi Coal & Iron Co., In re Hide,* L. R. 7 Ch. App. 28, which arose under the English Bankruptcy Act. The Court there held a landlord entitled to prove a claim in the difference between the rent reserved (£500 in that case) and the rental value (£200) for the residue of the term, a total of £2,348 18s. 6d. Discussing valuation, the Court said:

> "A landlord who finds premises which had been let at a beneficial rent thrown upon his hands, and cannot let them for anything like what he has done before, is entitled to prove exactly in the same way as a servant who has entered into an engagement with a master to employ him for ten years at £500 a year, and who is then suddenly deprived of his employment; in such

> a case he would be entitled to prove for £500 a year, minus what he could reasonably get for his services in the market. In the same way a landlord who has made a contract for £500 a year to be paid to him for the use of land, is entitled to claim £500 a year minus what he can get for the land from another tenant" (James, L. J., at p. 32).

Another case cited by this Court to show the "familiarity" of the "footing" was *Reading Iron Works—Sweatmen's Appeal,* 150 Penna. St. 369. This was a state court insolvency proceeding.

The claimant had let the property to the insolvent Iron Works by a lease under the terms of which

> "the lessor reserved the right to terminate the lease for the breach of any condition or covenant but stipulated that his action in so doing should not relieve the tenant from liability in damages for such a breach" (150 Penna. St. 374).

Upon the insolvency of the Iron Works an assignee for the benefit of creditors was appointed, the lease then having more than eight and one-half years to run. The landlord filed a claim for the present value of his loss. An auditor calculated the difference between the rental value for the remainder of the term and the rent reserved at $40,000.

The Court held the claim should be allowed for that difference, as being the present value of the loss, saying (p. 375):

> "This (the filing of a claim) was in effect an election by the lessor not to stand upon the covenant to pay rent during the remainder of the term, but for the benefit of both lessor and lessee to secure from the abandoned premises all that was practicable, holding the tenant liable in damages only for the actual loss sustained. *The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated.* This the auditor has done. *For these damages the lessor has a present cause of action,* Lothrop v. Reed,* 13 Allen, 294, and

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* *Lothrop* v. *Reed,* 13 Allen, 294 (Mass. 1866), held that in an insolvency proceeding a creditor upon an executory instalment contract might prove for the present value of his loss.

for that reason a right to share in the fund. The demand is not for rent, eo nomine, *for under the agreement the lessor has rented the premises to others. It is for the loss he suffers by reason of the difference of the rentals now obtainable in consequence of the peculiar arrangement and construction of the premises,*† *and the rental agreed upon as an inducement to him to make the investment for the use of the company."*

Some of the many cases holding difference between rental value and rent reserved the measure of damages in cases of anticipatory breach of lease are *Oldfield* v. *Angeles Brewing Co.,* 62 Wash. 260; *Clarkson* v. *Skidmore,* 46 N. Y. 297; *Huyler's* v. *Ritz-Carlton Restaurant Co.,* 6 Fed. (2d) 404 (D. Del.), and a host of other cases collected by Williston at pages 2492, 2494, Vol. III, *Contracts;* and also the following cases, which arose in proceedings for the liquidation of the defaulting tenant: *Leo* v. *Pearce Stores Co.,* 57 Fed. (2d) 340 (E. D. Mich.); *Kalkoff* v. *Nelson,* 60 Minn. 284;* *McGraw* v. *Union Trust Co.,* 135 Mich. 609;* *Ex parte Blake,* 11 Ch. Div. 572; *In re Carruthers,* 2 Mans. 172.

Hermitage v. Levine Not Applicable.

The Trustee's claim that the 1945 loss must be taken is rested chiefly on a decision of the Court of Appeals of New York, *Hermitage* v. *Levine,* 248 N. Y. 333. In this case a covenant providing that upon re-entry by the landlord the tenant should remain liable for damages was construed as imposing no liability until the end of the term.

This construction was based upon a number of facts not present in this case and also upon the language of the damage covenant in question, which convinced the Court that the parties intentionally agreed that the liability to make up the loss would not accrue until the end of the term.

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† The lessor at the special instance of the tenant had made certain peculiar changes in the premises. This, rather than an economic depression, was responsible for the decreased rental value of the premises.

* Cited with approval by this Court in the *Filene* case.

But in *Hermitage* v. *Levine* the defaulting tenant was not insolvent. The question of the *valuation* of an indemnity covenant was not before the Court. The tenant had not by bankruptcy, insolvency or otherwise repudiated the indemnity covenant, and, so far as appears, there was no reason to believe that it would be unable to meet the obligation when it fell due.

Moreover, the damage covenant in [redacted] unlike that in *Hermitage* v. *Levine,* is expressly a[redacted]le in the event of bankruptcy or insolvency. It is [redacted]ore to be supposed that the parties intended to draf[redacted]venant provable in liquidation proceedings, for only in [redacted]ch proceedings could any damages be recovered.

It is a little too much to suggest that by the terms of the indemnity clause here at issue the landlord expected to collect from the corporation *after* insolvency. As the Supreme Court of Minnesota said in *Minneapolis Baseball Co.* v. *City Bank,* 74 Minn. 98, at p. 103:

> "Observation and experience teach us that this possibility is extremely remote, and that insolvent financial concerns rarely survive proceedings in liquidation."

And as said by Judge Lowell in *Ex parte Pollard,* Fed. Case No. 11,252, in 1875:

> "It is easy to show the very great hardship of a negative answer to this question (provability of a claim for damages for anticipatory breach of a contract of employment). No corporation that has been wound up in bankruptcy in this district has ever been revived in such a form as to give its old creditors redress."

PRESENT VALUE OF CONTRACT ASCERTAINED AND ALLOWED IN BANKRUPTCY WITH RESPECT TO BREACH OF COMPARABLE FORWARD CONTRACTS.

As Judge Hand points out in his opinion in the *Manhattan Properties* case:

> "Moreover the whole subject has taken on a new aspect from Central Trust v. Chicago Auditorium, 240

U. S. 581, where bankruptcy was held to be the anticipatory breach of a contract to pay annually for a cab privilege which the grantor might revoke. *The uncertainties attendant upon any future instalments were as great as in the case of a covenant to pay rent under a lease.*"

In the petition we referred to some of the other forward contracts, damages with respect to which could be proved in bankruptcy:

A life annuity (*Cobb* v. *Overman*, 109 Fed. 65 [C. C. A. 4th]);

Endorsement of commercial paper (*Maynard* v. *Elliott*, 283 U. S. 273);

Contract of suretyship (*Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549);

Instalment contract to buy ice (*In re Stern*, 116 Fed. 604 [C. C. A. 2d]);

Employment contracts (*Ex parte Pollard*, Fed. Cas. No. 11,252 [D. Mass.]; *In re Schultz & Guthrie*, 235 Fed. 907 [D. Mass.]);

Contract to buy cotton bagging (*Lesser* v. *Gray*, 236 U. S. 70);

Instalment contract to sell rubber (*In re Portage Rubber Co.*, 296 Fed. 289 [C. C. A. 6th]);

Contract to buy stock (*In re Pettingill*, 137 Fed. 143 [D. Mass.]).

In none of these cases was it regarded as necessary that the loss be actually experienced; all recognize, directly or indirectly, that the victim may prove in the amount of the present value of the contract.

In *In re Stern*, 116 Fed. 604 (C. C. A. 2d), the bankrupt contracted to sell ice in instalments at $2 a ton to various persons. At the time of default the contracts had from two to five years to run. To buy the ice elsewhere then cost from 60 cents to $1.50 more than $2 a ton; the Court said:

"Petitioners could not replace the contract without suffering a direct loss much in excess of $500, and were

creditors for the requisite amount and were not obliged to await the expiration of the time for which the contracts were to continue" (p. 608).

The same Court in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721 (C. C. A. 2d), an equity receivership proceeding, holding that the damages suffered by the Metropolitan Express Company because of the insolvent's default on a forward contract were susceptible of present ascertainment, said:

> "The facts stand out for themselves. *It is manifest that the Metropolitan Express Company met a serious loss.* * * * The Metropolitan Railway Company and its lessee, the City Company, became insolvent and their railroads went into the hands of receivers. *The result was that the Express Company, without any fault on its part or on the part of its assignee, lost the benefit of this contract* * * * (at pp. 742-743) * * * *Manifestly the claimant was entitled to recover the value of its contract"* (p. 745).

The contract in question had thirteen years to run at the time of termination and it appears from the opinion that the profits under it had fluctuated widely during the term of its existence (198 Fed. 736).

INDEMNITY CONTRACTS.

The case of *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, concerned the provability of an indemnity contract. The creditor had not experienced the loss at the time of the bankruptcy and its amount was uncertain, but the loss was held provable. To the same effect is *In re Buzzini*, 183 Fed. 827 (S. D. N. Y.). Both these cases were cited with approval by this Court in *Maynard* v. *Elliott*.

In *Equitable Trust Co.* v. *Western Pacific Ry. Co.*, 250 Fed. 327 (C. C. A. 2d), an indemnity contract having many years to run was found to have been anticipatorily breached and damages in the amount of over $38,000,000 assessed (p. 330). The opinion cited at least two bankruptcy cases as authority for the procedure (p. 339).

The Analogy to Employment Contracts and Endorser's Liability.

The analogy between damages upon anticipatory breach of lease and those upon such breach of endorsement of commercial paper and employment contracts should not be overlooked.

In all those cases the total possible claim is strictly limited in amount, viz., the total rent, the face amount of the paper, the total salary. In all the provable damages are the total possible claim less the salvage value available to the victim: the rental value of the real estate, the potential recoupment from the maker, the earning possibilities of the employee.

The same is true of the contract of indemnity or suretyship, where a gross limited amount of damages is liable to be lessened by possible salvage.

The Analogy to Secured Claims.

The analogy between the landlord's claim and that of the secured creditor is also close. Land is often spoken of as the landlord's security.

Now in bankruptcy the secured creditor is allowed to prove "for such sums only as to the courts seem to be owing over and above the value of their securities" (Act, Sec. 57-e).

What is "owing" to the landlord is the aggregate rent for the remainder of the term, discounted, and the value of his "security" is the rental value of the remainder of the term.

To be sure, it is *conceivable* that rents will go up so that eventually no loss will be suffered, *but it is just as conceivable* that the security of a secured creditor will so go up in value that by the time the money in a supposed case was actually due to be paid to the creditor, the security would be worth the amount payable.

Courts do not allow themselves to be baffled by such speculations. They take the sum owing, discount it, deduct the present value of the security, and allow the difference.

Landlords, we submit, deserve the same treatment.

Dunbar v. Dunbar Distinguished.

The Trustee has placed some confidence in *Dunbar* v. *Dunbar*, 190 U. S. 340, cited by this Court and *Maynard* v. *Elliott*, 283 U. S. 273, 278, as an illustration of claims not provable because incapable of valuation. The *Dunbar* case concerned a settlement agreement between husband and wife to expire upon the wife's remarriage. There is no present value to such a contract because its term depends upon other than economic considerations.

On the other hand, in cases of this character, there is no difficulty if the standard rule of ascertaining damages for anticipatory breach of contract be applied—a hundred cases recognize that the rental value of the remainder of a term can be ascertained; the Trustee istelf concedes the amount is "definitely measurable."

The English courts also hold that damages upon breach of a settlement agreement unprovable because incapable of valuation (*Linton* v. *Linton*, L. R. 15 Q. B. D. 239), although fully recognizing the ascertainability and provability of damages for bankrupt's anticipatory breach of lease (*Ex parte Llynvi Coal & Iron Co.*, 7 Ch. App. 28, cited by this Court in the *Filene* case).

POINT V.

Under any circumstances that part of the claim for $4,404.40 is provable.

Of the total claim, $4,404.40 is for loss suffered to the date of termination of the lease. The figure is reached by deducting actual income from rent reserved for the months of September, October and November to November 26, 1933. Certainly there is no doubt of the accrued nature of the loss and its susceptibility of liquidation. Nor had there been non-enjoyment, or at least non-availability of enjoyment, up to the time of re-entry.

It seems positively ruthless to disallow this item, and that paragraph of his opinion relating to this item indicates that Judge Hand thought so too.

CONCLUSION.

A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

State of Law in the Various Circuits.

FIRST CIRCUIT:

In the First Circuit a landlord apparently may prove for damages, as opposed to rent, when the lease provides that the damage clause ripen contemporaneously with the filing of the petition. *R. C. Taylor Trust* v. *Kothe,* 30 Fed. (2d) 77 (C. C. A.). This case was reversed by this Court upon the sole ground that the damages provided in the lease, viz., total unaccrued rent, bore so little relation to actual loss as to be penal in character (280 U. S. 224).

In *Slocum* v. *Soliday,* 183 Fed. 410 (C. C. A.), the Court, approving *In re Roth & Appel,* held a claim for damages unprovable because the damage clause operated only on determination of the lease; and that had not been contemporaneous with the filing of the petition.

The decision in *Maynard* v. *Elliott* has removed the distinction between the *Kothe* and *Slocum* cases, and, if the language of the Court in the *Kothe* case is to be applied, a claim for actual damages upon express covenant, even if it ripened after the filing of the petition, would be provable.

SECOND CIRCUIT:

The last view of the judges of this Circuit appears herein.

THIRD CIRCUIT:

In *In re Caloris Mfg. Co.,* 179 Fed. 722, the Pennsylvania Eastern District Court (McPherson, J.), expressly declining to follow *In re Roth & Appel,* and holding that it was not necessary that liability on a claim be fixed at the time of the filing of the petition, held provable a landlord's claim for damages based upon an express covenant. The *Caloris* case was cited with approval by this Court in *Maynard* v. *Elliott.*

Judge McPherson followed the *Caloris* case in *In re Keith-Gara Co.,* 203 Fed. 585 (E. D. Penna.), again expressly disapproving *In re Roth & Appel,* and was affirmed by the Circuit Court of Appeals, 213 Fed. 450. The Court of Appeals stated *per curiam* that Judge McPherson's opinion was "expressive of the views also reached by this Court."

To the same effect is *In re Orne,* 12 Fed. 779 (E. D. Penna.).

In the absence of express covenant, or upon a covenant accelerating total unaccrued rent, the landlord, in Pennsylvania at least, may refuse a surrender and prove for the total unaccrued rent, but must turn over to the trustee the rents received from the property during the entire term, or he may accept a surrender, which terminates all rights. *Wilson* v. *Pennsylvania Trust Co.,* 114 Fed. 742 (C. C. A.); *Rosenbloom* v. *Uber,* 256 Fed. 584 (C. C. A.); *Electric Appliance Co.* v. *Ellis,* 4 Fed. (2d) 108 (C. C. A.).

The Circuit Court of Appeals in these cases displayed great anxiety to follow the state law, indicating, in view of *Reading Iron Works—Sweatmen's Appeal,* 150 Penna. St. 369, that an indemnity covenant for actual loss would be honored and enforced.

FOURTH CIRCUIT.

No cases found.

FIFTH CIRCUIT:

In *Martin* v. *Orgain,* 174 Fed. 772 (C. C. A.), the Court held provable a landlord's claim for unaccrued rent, deducting rent received from others. Both the lease and a Texas statute provided that the landlord should have a lien for rent due and to become due. The Court distinguished its earlier decision in *Atkins* v. *Wilcox,* 105 Fed. 595, holding invalid a landlord's claim as not due at the time of the filing of the petition, on the ground that in the earlier case the effects of a statutory lien had not been considered.

SIXTH CIRCUIT:

The Circuit Court of Appeals allows or disallows claims as a matter of substantive law. Thus, in *Wells* v. *Twenty-first Street Realty Co.*, 12 Fed. (2d) 237, expressly following *Gardiner* v. *Butler*, the claim was disallowed because under Ohio law a landlord has no claim for damages for anticipatory breach of a lease contract. There was no indemnity covenant in the lease there involved. But in *Schneider* v. *Springman*, 25 Fed. (2d) 255, the Circuit Court of Appeals allowed in full a claim for eleven months' rent unaccrued at the time of the filing of the petition, that being the entire rent due for the unexpired portion of the term. In *In re McAllister-Mohler Co.*, 46 Fed. (2d) 91 (S. D. Ohio), the Court, referring to the *Filene* and *Gardiner* cases, said (at p. 95):

> "These cases are a complete answer to the contention that, if a landlord cannot prove a claim for anticipatory breach of a lease, he is remediless, for it is clearly within his power to protect himself by an appropriate clause in the lease."

SEVENTH CIRCUIT:

The Circuit Court of Appeals allows landlords' damages in full, apparently irrespective of indemnity covenant. In *In re Chakos*, 24 Fed. (2d) 482, the Court said (p. 485):

> "It is contended by appellant Frawley that the District Court erred in not allowing his claim for rental (1) prior to filing of the petition (as a general claim); (2) from the date of the filing of the petition to the date of vacation of his premises by the trustee (as a part of the costs of administration); and (3) *for the future in so far as he has been damaged by the bankrupt's breach of the lease (as a general claim)*. Clearly the delinquent rental due lessor at the time of the filing of the petition is a general claim, and, if not already allowed as such, should be so allowed by the referee. *Clearly, also, Frawley's claim as to damages should be allowed as a general claim, if and when liquidated.*"

In so far as damages for breach of the lease were concerned, the Court reversed the District Court, and directed further proceedings in conformity with its opinion.

In *In re Desnoyers Shoe Co.*, 227 Fed. 401, the Court had held provable a lessor's claim for such damages as under the terms of a lease of personalty became payable upon termination.

The Seventh Circuit has always been friendly to claims on executory contracts.

EIGHTH CIRCUIT:

In *Watson* v. *Merrill*, 136 Fed. 359, and *Britton* v. *Western Iowa Co.*, 9 Fed. (2d) 488, the Circuit Court of Appeals held "future rent" unprovable.

NINTH CIRCUIT:

Following *In re Roth & Appel*, the Circuit Court of Appeals has held, *Colman Co.* v. *Withoft*, 195 Fed. 250, that a covenant by one lessee to indemnify a co-lessee to the extent of one-half the amount necessary to procure the rescission of a lease was not provable because liability had not been fixed at the time of the filing of the petition.

TENTH CIRCUIT:

No cases found.